

MEMORANDUM OF LAW

DATE: June 7, 1990

TO: Planning Commission

FROM: City Attorney

SUBJECT: Legal Evaluation of Proposed Revisions
Affecting the Future Urbanizing Areas of the
City of San Diego

As an element of the Growth Management Program, the City Council is considering amendments to City policies and ordinances which would affect the development potential of land located in the Future Urbanizing areas of the City and zoned A-1 (Municipal Code section 101.0404). In the event of a change from Future Urbanizing to any other land use designation, such action would be subject to the provisions of Proposition A, approved by the voters on November 4, 1985, a copy of which is attached as Enclosure 1.

This office has been asked to determine whether the amendment or repeal of Council Policy 600-29, amendments of the FW zone (Municipal Code section 101.0403), A-1 zone (Municipal Code section 101.0404), Planned Residential Development ordinance (Municipal Code section 101.0901) or Conditional Use Permit ordinance (Municipal Code section 101.0510) are legally permissible.

Turning first to the council policy, it is our opinion that the Council, as the legislative body of the City, has the authority to enact or repeal council policies. Council policies establish municipal policies to guide the various functions of the City and, where necessary, to establish procedures by which functions are performed (Council Policy 000-01). In the case of Council Policy 600-29, the City Council, on July 20, 1981, expressed its policy concerning the maintenance of Future Urbanizing areas as an Urban Reserve and followed that with the adoption of implementing amendments to the zoning regulations applicable to the A-1 zone and Planned Residential Development ordinances. If the Council determines that Council Policy 600-29 no longer represents the majority position of the Council

relating to the matter covered by the policy, the Council may clearly rescind or modify the council policy without causing the City to incur any liability.

The second issue to be addressed relates to proposed amendments to the FW, A-1, Planned Residential Development and

Conditional Use Permit ordinances identified above. These ordinances represent legislative enactments by the City Council which are authorized by the provisions of Article XI, Section 7 of the California Constitution which provides that "a county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws." Pursuant to this authority, referred to as the police power, The City of San Diego has enacted Municipal Code section 101.0203 which provides:

Section 101.0203 Procedure for Zoning --
Requirements

Whenever the public necessity, convenience or general welfare, or good zoning practice justifies such action, and after due consideration and report on the same by the Planning Commission, the City Council may, by ordinance, include or place any property within The City of San Diego into any zone as established, created and defined in Chapter X, Article 1 of the San Diego Municipal Code, subject to the restrictions designated in Section 101.0208.

In addition, The City of San Diego has enacted Municipal Code section 101.0510, Conditional Use Permit, which provides:

A. PURPOSE AND INTENT

Certain classes of land use are not permitted by right in some or all zones of the City, but are nevertheless recognized as being desirable to the full function of the City under appropriate circumstances. It is the purpose of the Conditional Use Permit regulations to provide a means whereby proposals for such land uses may be examined on a case by case basis to determine whether, and under what conditions, these uses may be approved at a given site.

It is intended that when these classes of land use are approved, each proposal will be developed so as to fully protect the health, safety, and

general welfare of all persons who live or work in the area. It is further intended that proposals developed under a Conditional Use Permit will incorporate the highest standard in the site planning, architecture, environmental protection, and sensitivity to the neighborhood character.

It is intended that in exchange for the development and land use privileges extended under

a Conditional Use Permit, the permittee will agree to abide by all conditions which the City may require. It is intended that both these privileges and conditions shall constitute a covenant which runs with the lands, and in addition to binding the permittee shall likewise bind each successor in interest.

This section identifies those classes of land use for which a Conditional use Permit may be granted and establishes the legal framework for the administration of permits.

The City of San Diego has also enacted Municipal Code section 101.0901, Planned Residential Developments, which provides:

A. PURPOSE AND INTENT

The purposes of the Planned Residential Development regulations are to facilitate development of areas designated for residential use (including Mobile Home Parks as defined in Chapter X, Article 1, Division 10 of the San Diego Municipal Code) in adopted community plans with the exception of projects in the R-1 zones or projects combining areas containing R-1 and any other zone permitting residential uses, within the Urbanized Communities as defined in the General Plan; to encourage imaginative and innovative planning of residential neighborhoods offering a wide variety of dwelling unit types and site arrangements with well-integrated community facilities and services; to use for development in areas which include steep slopes, particularly HR zoned properties, in such a manner to achieve minimum disturbance of the natural terrain and vegetation; to permit utilization of this concept in low-density development in agricultural zones; and to permit greater flexibility in design of residential

neighborhoods than is possible through strict application of conventional zoning and subdivision regulations.

All of these ordinances represent actions of The City of San Diego under its police power. Since the enactment of these ordinances represent proper exercises of the police power, it follows that the repeal or amendment of these ordinances would represent proper actions under the police power if the City Council finds it is in the interest of the public health, safety

and general welfare to do so. Cal. Constitution, article XI, section 7. It must be borne in mind that the provisions relating to Planned Residential Development and Conditional Use Permits represent possible uses of land that are in addition to the uses of land authorized by the provisions of the A-1 zones. While the removal of the opportunity to seek a Planned Residential Development or Conditional Use Permit may frustrate the plans of a property owner, a property owner does not have a present right to a future use of property. *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785, 793, 132 Cal.Rptr. 386 (1976). This is similar to the situation where land is rezoned to a zone that is more restrictive. The distinction between the situations relates to the fact that Planned Residential Development and Conditional Use Permits are discretionary while the permitted uses of the land allowed by the underlying zone remain as they were before the enactment of the provisions in question.

We have reviewed the proposals contained in Planning Report 90-158 relating to amendments to Council Policy 600-29, A-1 zone, Planned Residential Development ordinance, Conditional Use Permit ordinance and the FW zone. It is our opinion that none of these proposals contain provisions that cannot be legally enacted provided the City Council finds that doing so promotes the public health, safety and general welfare of the citizens of the City of San Diego.

It has been suggested that development in the Future Urbanizing area under the current provisions of Council Policy 600-29 and the Planned Residential Development ordinance requires a vote of the people based on the provisions of Proposition A. It is our opinion that a vote of the people is not required by Proposition A.

Proposition A, Section 1, requires a vote of the people before land may be changed from Future Urbanizing to Planned Urbanizing as those areas are depicted in the Progress Guide and General Plan or before the provisions restricting development are

"amended." The term "amended" is defined in Section 2(c) to mean any proposal to amend the text or maps of the Progress Guide and General Plan affecting the Future Urbanizing designation as the same existed in the Progress Guide and General Plan on August 1, 1984, or the land subject to said designation on August 1, 1984, except amendments which are neutral or make the designation more restrictive in terms of permitting development.

Proposition A addressed the subject of shifting land from the Future Urbanizing designation to any other designation.

Utilization of land pursuant to Council Policy 600-29 and the Planned Residential Development ordinance does not require a shift of designation. The subject of Council Policy 600-29 is the "Maintenance of Future Urbanizing area as an Urban Reserve." Proposition A makes no reference to this subject. On the other hand, Council Policy 600-30 addresses the subject of "General Plan Amendments to Shift Land from the Future Urbanizing to Planned Urbanizing Area." Following approval of Proposition A by the voters, the City Council amended Council Policy 600-30 to incorporate the requirement that changes from Future Urbanizing to Planned Urbanizing be approved by the voters. This action was mandated by Sections 3 and 4 of Proposition A. The provisions of Council Policy 600-29 and the ordinances in question were in effect at the time that Proposition A was prepared and petitions circulated. Had the drafters of Proposition A intended to cause changes of existing ordinances or a policy other than that relating to changes from Future Urbanizing to any other land use designation, such matters could have been included in Proposition A, but were not. In the absence of such changes being included in Proposition A, development can occur utilizing the provisions of Council Policy 600-29 and the ordinances in question, subject to any changes that may be made to Council Policy 600-29 and the ordinances.

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Enclosure
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